I.

Identity of Parties.

A. The Government.

Respondent United States of America will be referred to in this Petition as the "Government".

B. Goggin.

George T. Goggin, Esq., is the trustee in bankruptcy for four bankrupt corporations, Trans-Pacific Corporation, Columbia Stamping and Manufacturing Corporation, New-Bart Stamping and Manufacturing Company and Communications Equipment Company. Mr. Goggin in his capacity as trustee in bankruptcy for these corporations will be referred to as "Goggin".

C. American Pumice.

Respondent American Pumice Company will be referred to as "American Pumice". It is the corporate vehicle by which and through which this litigation was carried on for the benefit of Goggin and Heath pursuant to the order of compromise duly and regularly made and entered October 20, 1959.

D. Heath.

P. S. Seymour-Heath owned or controlled all of the bankrupt corporations of which Goggin is and was trustee, and in addition, a controversy existed at or prior to October 20, 1959, as to whether Heath or Goggin was entitled to the stock of American Pumice. Heath entered into a compromise with Goggin, all as set forth in the Opinion of the Court of Appeals for the Ninth Circuit of January 10, 1968, a copy of which is attached hereto as Appendix III. Petitioner P. S. Seymour-Heath will hereafter be referred to as "Heath".

II.

Orders and Opinions Involved.

The immediate Order with respect to which review on certiorari is sought is the Order of the United States Court of Appeals for the Ninth Circuit dated May 8, 1969, denying Heath's Motion To Recall the Mandate of that Court issued in an appeal entitled, "United States of America, Appellant, v. American Pumice Company, Appellee," No. 20290. A copy of the said Order is attached to this Petition and marked Appendix I. It does not appear in any official or unofficial report. The Opinion of the United States Court of Appeals for the Ninth Circuit which preceded the Order of May 8, 1969, is dated November 15, 1968. It is reported 404 F. 2d 336 and it is attached to this Petition and marked Appendix II. Petitioner does not seek to overturn this Opinion but seeks to recall the mandate of the Court in order that the balance of the case may be heard and in particular the case of Heath. Necessary to this case and Heath's present Petition is the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit made and entered in that certain proceeding entitled, "P. S. Seymour-Heath, Appellant, v. George T. Goggin, Trustee, etc., Appellee," and numbered in the files of the Clerk of the Court of Appeals for the Ninth Circuit 21868. That Opinion and Judgment was made and entered January 10, 1968, and was reported 389 F. 2d 327.

III:

Concise Statement of Grounds on Which the Jurisdiction of This Court Is Invoked.

A. Judgment or Decree Sought to Be Reviewed.

Heath seeks review of the Order of May 8, 1969, denying his Motion that the Court of Appeals for the Ninth Circuit make and enter its order or orders, as follows:

1. That the Court recall its mandate heretofore issued in this case on or about January 2, 1969, and spread by the United States District Court January 28, 1969.

2. That the Court authorize Heath to employ his own counsel and proceed with the appeal of American Pumice Company.

3. That, in the alternative, this Court allow Heath to proceed by way of relief in the United States District Court in the nature of a bill of review.

Heath does not seek to overturn the Judgment of the Court of Appeals entered November 15, 1968 (Appendix II); on the contrary, he seeks an opportunity to present his case to the Court of Appeals and to enforce the Judgment of the Court of Appeals dated January 10, 1968 (Appendix III).

B. Rehearing.

No petition for rehearing or motion for reconsideration was made due to the nature of the motion. No extension of time within which to file petition for certiorari was requested. The Petition will be filed within the ninety days provided by law.

C. Statutory Provision Conferring Jurisdiction.

It is believed that jurisdiction is conferred upon the Supreme Court of the United States in this case by 28 U.S.C. § 1254(1). With respect to time, see 28 U.S.C. § 2101(c).

D. Grounds of Petition.

The grounds of this Petition include:

(1) This case involves an important question of law involving the due process clause of the Constitution of the United States which has not been, but should be, settled by this Honorable Court.

(2) The decision of the Court of Appeals is in conflict with opinions of this Court and of the Court of Appeals in related areas which should control this decision.

(3) The Court of Appeals has departed from the accepted and usual course of judicial proceedings in that it did not recognize Petitioner's right to be heard and it has failed to recognize its obligation to follow its prior decision (Appendix III) which is *res judicata* of the Petitioner's right to counsel and to be heard.

IV.

Questions Presented for Review.

A brief statement of the questions presented for review follows:

A. Is there a violation of the due process clause of the Constitution (Amendment V) where by the circumstances of the case, including the position taken by the trial court and the mistake of counsel as to their duty, a citizen (Heath) is (1) denied the right to counsel in a civil case and (2) is refused the right in that case to present his case to the Court of Appeals.

B. Does the Court of Appeals and this Court have power to recall a mandate where the application for recall was within the same term as the mandate, there could be no possible prejudice to opposing parties in recalling the mandate, and the purpose of the recall was to permit Heath to present his case to the Court of Appeals which he had been prevented from doing by reason of the facts hereafter detailed.

C. Must a mandate be recalled where the rights of the real party in interest (Heath) to counsel and to be heard have been defeated by counsel who were duty bound to represent the real party but refused because of a mistaken view of an order of the trial court (referee in bankruptcy) and a mistaken view of their duty to another party (Goggin).

D. Must there be a recall of the mandate where contrary to a prior final judgment which is *res judicata* the Court of Appeals has not heard or considered the case of the real party in interest (Heath) and a recall is necessary to consider the appeal of real party (Heath) and also necessary in order to carry out the rights established to Heath by the prior final judgment.

V.

Constitutional Provisions.

Fundamentally, we are relying upon the common law powers of the Court to recall a mandate in the interest of justice. We believe that there is clearly involved the Fifth Amendment to the Constitution of the United States which provides, among other things:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

In short, the due process clause applicable to the United States of America and its courts is directly involved.

VI.

Concise Statement of the Case.

The facts presented on our Motion To Recall Mandate and for other relief, including the Motion, the Brief in support thereof and the Affidavit of Heath, were not denied or contested in anyway. In its Opposition the Government opposed the Motion but did not question the facts stated. The Government did not question the power of the Court to recall the mandate either. The Government in fact requested in its Opposition, "In the event that P. S. Seymour-Heath should be allowed to prosecute an appeal, since defense on the merits to that appeal would inevitably raise again issues presented in the Government's appeal, we would respectfully urge a rehearing of that appeal." We would like to observe here that actually the ruling of the Court on the position of the Government in the appeal (Appendix II) would probably require the Court to rule favorably upon the position of Heath in his case. Thus had there been before the Court of Appeals an argument and a presentation of Heath's case, the same decision of the Court of Appeals would have resulted in an increase in the award by some $1.3 Million to $2 Million.

Briefly stated, the facts are these:

Prior to October 20, 1959, Goggin claimed (as trustee) all the issued and outstanding shares of American Pumice. Heath also claimed all of the issued and outstanding shares of American Pumice. These adverse

claims were of extreme importance to both parties, for the reason that the rights in condemnation of American Pumice were of great value. It was recognized that they were worth somewhere between $1.3 Million and possibly $2 Million. This would represent the primary assets of Goggin in the said bankruptcies and it also represented the primary asset of Heath. As a result of these antagonistic claims, a compromise was negotiated and confirmed by an order of the bankruptcy Court on October 20, 1959. Pursuant to the order, Heath designated Messrs. Victor R. Hansen and Hodge L. Dolle counsel to represent American Pumice in the condemnation proceedings. They represented American Pumice in those proceedings and in 1964 the United States District Court for the Southern District of California (now Central District) made and entered its judgment in favor of American Pumice and against the Government in the sum of $167,200.00 plus interest at six percent (6%).

Thereafter, notice of appeal was filed on behalf of American Pumice but not perfected by Messrs. Hansen and Dolle.

A notice of appeal was filed on behalf of the Government and record gotten up, and appeal perfected and presented to the Court of Appeals.

A critical aspect of this case is the Order in Compromise of October 20, 1959. In view of the dispute between Goggin and Heath as to the ownership of the issued and outstanding shares of American Pumice and in view of the fact that its mining claims in condemnation were the only real assets available to Goggin and to Heath, the compromise sought to protect both parties. In substance, the Order provided:

A. That American Pumice would carry on the litigation against the Government for the benefit of Heath and Goggin;

B. Upon recovery, the proceeds would go to Goggin for expenses of administration and to pay creditors and thereafter the balance would belong to Heath.

C. In order to protect the interest of both Goggin and Heath, the Order provided that Goggin and Heath woul be jointly represented by counsel of Heath's choosing approved by the referee in bankruptcy. Thus although Heath had a right to initiate a selection, Goggin was protected in that selection by reason of the necessity of obtaining the referee's approval. As a practical matter, the trial did not commence until 1964 and Goggin and Heath were jointly represented through American Pumice by Messrs. Hansen and Dolle (See Appendix III).

After the entry of judgment in the condemnation proceedings, notice of appeal was filed by the Government. Upon the demand of Goggin, an appeal from the said judgment was filed May 7, 1965, on behalf of American Pumice by Messrs. Victor R. Hansen and Hodge L. Dolle. Demand was further made by Heath, A. J. Bumb (general counsel to Goggin) and Goggin upon Messrs. Hansen and Dolle to file cross-appeals necessary to the protection of the rights of Heath and Goggin and the creditors involved. By letter dated May 17, 1965, Messrs. Hansen and Dolle refused to file the said cross-appeals and refused to prosecute the appeal already filed so that it failed and was not heard or determined by the Court of Appeals.

Thereafter the appeal of the Government from the said judgment was carried forward and the judgment

of the trial court affirmed by the Court of Appeals by its decision dated November 15, 1968, and its opinion (Appendix II) rendered in connection therewith.

In refusing to proceed with appeal and cross-appeal in order that the interests and claims of Heath might be heard and determined, Messrs. Hansen and Dolle were laboring under the misapprehension that they represented Goggin solely and had no interest or duty to Heath. It was the position of Messrs. Hansen and Dolle and the Referee in Bankruptcy that the compromise approved by the Referee in Bankruptcy October 10, 1959, did not bind the Court, Goggin or counsel for American Pumice.

This matter, however, was settled by the Court of Appeals on January 10, 1968 (Appendix III).

After Messrs. Hansen and Dolle commenced their representation of Goggin and Heath, Messrs. Hansen and Dolle assumed that they represented only Goggin and that they might take such position or positions as they chose irrespective of the interests and rights of Heath.

Considerable friction developed as a result of this, but the question of the rights of Heath were not determined until the opinion written by the Court of Appeals on January 10, 1968. By that time the condemnation judgment had been entered, the case taken to the Court of Appeals on the Government's appeal and Heath's right of cross-appeal destroyed.

The condemnation case in which Messrs. Hansen and Dolle were designated to represent Goggin and Heath went to trial February 4, 1964, and judgment was thereafter entered in *United States v. 237,500 Acres of Land,* 236 F. Supp. 44 (S.D. Cal. 1964).

As a result of the failure of Messrs. Hanesn and Dolle to carry forward the appeal of American Pumice, the position and claims of Heath and the true measure of recovery in the proceedings in the United States District Court for the Central District of California were never submitted to nor considered by the Court of Appeals. On the contrary, the Court of Appeals had before it on appeal a very narrow issue which did not consider the major points necessary to be considered in order to determine the propriety of the claims of Heath. The Court of Appeals affirmed the judgment of the District Court November 15, 1968, on the appeal of the Government only. The mandate was spread January 28, 1969.

In and by the record in this case and the position of the said Heath, the actual value of the property taken and the damages suffered by reason of the taking amounted to a total of not less than $1,300,000.00 plus interest at six percent per annum, which said interest amounted to approximately $1,560,000.00, making a grand total in excess of $2,860,000.00. There was no evidence contrary to the experts on value and the lowest expert appraisal was $1,300,000.00 so that the issue became one of law. This shows the alarming inadequacy of the judgment rendered by the trial court in the sum of $167,200.00 plus interest at six percent approximating $198,000.00, or a total of $360,000.00.

Heath made various efforts, both in the trial court and in the Court of Appeals, in *pro. per.*, for the purpose of bringing this matter to the attention of the Court of Appeals. These efforts were unsuccessful, but at that time, it was not clear what remedies were open to Heath in view of the fact that Messrs. Hansen and

Dolle had misconceived the true intent, tenor and purpose of the order of compromise of October 20, 1959. In addition, a determination of the validity and effectiveness of that order was not established until after the periods for apeal and the periods for getting up the record, filing briefs and arguing this cause in the Court of Appeals had expired. In addition, there was no possible way that the matter could be again tried without an expression of the Court of Appeals. A consideration of the problems present in the District Court without an appeal in which Heath was in fact represented shows that the Court of Appeals did not and could not determine the issues involved.

Until Messrs. Hansen and Dolle filed their application for fees in connection with their services to Goggin through American Pumice, it was not clear that they considered that their only duty lay in representing Goggin. On February 11, 1969, Messrs. Hansen and Dolle filed a verified Petition stating that they had represented Goggin only and sought compensation accordingly. After that the Motion here under consideration was filed.

Thus the correct interpretation of the Order of October 20, 1959, was not authoritatively determined until January 10, 1968, by the Court of Appeals and at that time that Court squarely held that the rights of Heath under the October 20, 1959, compromise order could not be defeated (see Appendix III).

VII.

Basis of Jurisdiction of Court of First Instance.

The United States District Court for the Central District of California had jurisdiction in the first instance under 28 U.S.C. § 1358.

VIII.

Reasons Relied on for Allowance of Writ.

Our grounds for certiorari in this case may be discussed together. Fundamentally, Heath's cry for help from this Court is grounded on the fact that although he had a final judgment entitling him to counsel and to be heard in a civil condemnation case, this right not only of the Constitution but of the Order of the trial court was effectively and completely defeated so that he lost his rights to counsel, he lost his right to be heard by the Court of Appeals, and consequently he lost the benefit and purpose of the Order of October 20, 1959, as interpreted by the Court of Appeals in its Opinion January 10, 1968, (Appendix III) was defeated.

The practical effect of the facts in this case demonstrate how a citizen can be economically destroyed by civil litigation simply because he is denied effective representation by counsel and because his adversaries and those with an apparent community of interest combine to defeat the benefits intended to be secured to him by the Order of October 20, 1959 (Appendix III). The courts below went along with this tragedy on various arguable theories which on a piece by piece basis seem to apply formal, correct rules, but which completely defeat the reason for being of the courts of justice—a hearing and determination on the merits of the controversy according to the fundamental doctrines of the Constitution, the common lat and equity.

In considering the facts of this case and whether certiorari should issue or not, we urge the Court to determine that the denial of due process in a civil case can and frequently does have more dire consequences

than denial in some criminal cases. We cannot have independent citizens capable of self-respect, self-determination, a zeal to build and develop their communities and an ability to participate intelligently in government without the just protection by due process of their property interests. Likewise, the courts are powerless to administer the law with equal justice for all citizens unless they insist upon due process in civil cases, so that before a determination is made, the court has heard and considered all relevant facts and arguments. Here the failure of due process has resulted in the Court of Appeals hearing only the position of the Government and Goggin. The true position of Heath, the citizen, has been effectively and completely blanked from view so that the Court of Appeals could not even consider his case. So he has been destroyed economically, not by a well considered judgment based on the facts and law urged by him and his adversaries, but by a judgment and determination in which the Court of Appeals refused to consider his branch of the case.

This Honorable Court has now thoroughly established the absolute right to counsel in criminal cases in order to satisfy due process.

Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758 (1964);

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

This Honorable Court also recognizes the importance and necessity of due process in civil litigation. Its most recent expression which shows a concern for the individual trapped in a position over which he has little control, if any, is *Sniadach v. Family Finance Corporation of Bay View,* 89 S. Ct. 1820 (June 9, 1969).

Just as in *Sniadach v. Family Finance, supra,* certiorari was granted in order to define and enforce procedural due process under circumstances necessary to the protection of the individual, here we have a comparable situation where Heath supposedly protected by the Order of October 20, 1959, was in fact defeated by forces and powers beyond his ability to defend himself without procedural due process.

It would seem that due process includes counsel in a case as complex as this just as much as it should include counsel in a criminal case. It is sufficiently difficult for those trained and admitted as counsel to the courts to handle the affairs of a litigant, but it is virtually impossible for an untrained person to be heard if the circumstances develop to the point where counsel is literally eliminated.

We believe it clear from our brief in support of our Motion To Recall that Heath has a clear right to the recall of the mandate, the reopening of his case and an opportunity to present that case to the Court of Appeals. We refer to our Motion and Brief in the record.

Wherefore, Petitioner prays that this Court issue its writ of certiorari to review the Order and proceedings of the Court of Appeals for the Ninth Circuit in this matter and exercise such discretion and review as to it may seem just.

LOUIS R. BAKER,
Counsel for P. S. Seymour-Heath.

WILLIAM J. CURRER, JR.,
Of Counsel.

APPENDIX I.

Order.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellant, v. American Pumice Company, Appellee. No. 20290.

Before: BARNES, DUNIWAY, and ELY, Circuit Judges.

The motion to recall mandate, filed herein on April 24, 1969, is denied.

Filed May 8, 1969.

/s/ Stanley A. Barnes
/s/ Ben C. Duniway
/s/ Walter Ely
United States Circuit Judges

APPENDIX H.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

United States of America, *Appellant,* vs. American Pumice Company, *Appellee.* No. 20,290.

[November 15, 1968]

Appeal from the United States District Court for the Southern District of California, Northern Division.

Before: BARNES, DUNIWAY and ELY, Circuit Judges.

PER CURIAM:

The United States appeals from the judgment in favor of American Pumice Company in a condemnation case. *United States v. 237,500 Acres of Land,* S. D. Cal. 1964, 236 F. Supp. 44. The appeal relates only to the rulings of the District Court in that part of its findings and opinion headed "Valuation" and appearing at 236 F. Supp. at 49-55. We affirm for the reasons stated by the District Court, but with certain qualifications. At page 51, the court said: "It is difficult to see how pumice claims can be comparable to one another unless adjacent or nearly so, as the quantity, quality, mining costs and access to market vary with each property." We cannot accept, as a valid general rule, the requirement that the comparables be "adjacent, or nearly so."

There may be cases where quite distant properties can be shown to be comparable in an economic or market sense, due allowance being made for variables such as those mentioned by the court. Here, however, no showing of such comparability was made. We also find it unnecessary to decide whether we agree or disagree with the views expressed by Judge Carter in *United States v. Land in Dry Bed of Rosamond Lake,* S. D. Cal. 1956, 143 F. Supp. 314.

AFFIRMED.

APPENDIX III.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

P. S. Seymour-Heath, *Appellant,* vs. George T. Goggin, Trustee, etc., *Appellee.* No. 21,868.

[January 10, 1968]

Appeal from the United States District Court for the Central District of California.

Before: BARNES, DUNIWAY and ELY, Circuit Judges.

DUNIWAY, Circuit Judge:

Appellee Goggin is the trustee in bankruptcy for four bankrupt corporations, Trans-Pacific Corporation, Columbia Stamping and Manufacturing Corporation, New-Bart Stamping and Manufacturing Company, and Communications Equipment Corporation. These bankruptcies have been pending since 1946. The record indicates that appellant, who will be referred to for convenience as "Heath" owned or controlled all of them, Trans-Pacific being a holding company for the others.

In or before 1959, a controversy existed as to whether Heath or the trustee was entitled to the stock of another corporation, American Pumice Company. The trustee claimed that Trans-Pacific owned it. The principal asset of American Pumice was property which the Government was then seeking to acquire through condemnation proceedings. The controversy as to the ownership in the stock in American Pumice, as well as certain others not here material, was settled by a com-

promise which was approved by the referee in bankruptcy, in all four estates, by an order dated October 20, 1959. The material parts of this order are set out in the margin.[1] The present controversy arises from this order, which, of course, is long since final.

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[1]"(a) GEORGE T. GOGGIN, as Trustee of the estate of TRANS-PACIFIC CORPORATION, claims to be the owner of all of the shares of capital stock of AMERICAN PUMICE CO. Said AMERICAN PUMICE CO. is a defendant in certain condemnation actions including without limitation, actions in the United States District Court of the Southern District of California respectively numbered 3472 Civil and 311 N.D. Civil.

"(b) P. S. SEYMOUR-HEATH, sometimes referred to as HEATH, claims to be the owner of said shares of stock of AMERICAN PUMICE CO. and of the properties and proceeds thereof involved in said condemnation proceedings.

. . . .

"(a) All of the shares of stock of AMERICAN PUMICE CO. shall be the property of GEORGE T. GOGGIN, as trustee of the estate of TRANS-PACIFIC CORPORATION, free and clear of any right, title, interest or claim by P. S. SEYMOUR-HEATH. . . . [T]he said HEATH . . . has [no] right, title, interest or claim in or to any of the properties or assets of AMERICAN PUMICE CO. or in or to any of the proceeds of any condemnation action involving AMERICAN PUMICE CO.

. . . .

"(b) GEORGE T. GOGGIN as trustee of said bankrupt estates shall after this order becomes final, do each of the following:

. . . .

"2. Pay to P. S. SEYMOUR-HEATH the sum of $2,500.00, same to be used in connection with costs and expenses incurred by said HEATH in the prosecution of said condemnation actions.

"(c) P. S. SEYMOUR-HEATH . . . agrees that upon this order becoming final, a further order may be made denying with prejudice the petition in reclamation filed by HEATH on or about November 9, 1953, and now pending . . . same being in respect to the ownership of the shares of stock of AMERICAN PUMICE CO., which said order shall also provide that the said GEORGE T. GOGGIN. as Trustee of the estate of TRANS-PACIFIC CORPORATION is the owner of all of the shares of said AMERICAN PUMICE CO. and that . . . said HEATH nor . . . has any right, title or interest in or to or

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least until 1966. Heath designated attorney Hugh L. Dolle to handle the trial of the condemnation cases for American Pumice; later, with Heath's consent, attorney Victor R. Hansen was also retained. The cases were tried and a judgment was entered on March 8, 1965 in

So far as appears, all parties fully performed, at favor of American Pumice for $167,250. Of this

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lien or claim against the stock of AMERICAN PUMICE CO. other than as may be provided for in this order.

"(d) P. S. SEYMOUR-HEATH : . . waives any interest in any of said condemnation actions or in the proceeds thereof or in any of the property referred to in any of said condemnation actions, excepting only as in this order is otherwise provided.

"(e) P. S. SEYMOUR-HEATH agrees that any claim of him or of any assignee of him shall be subordinated to the payment of all other creditors as herein provided. HEATH also agrees that when the order becomes final, we will waive any claim or right of action he may have, if any, against the said GEORGE T. GOGGIN in respect to each, all and any of the bankrupt estates referred to the date hereof, excepting the matters to be performed by the trustee under the provisions of this order. . . .

. . . .

"(g) When this order shall become final, the trustee shall cause AMERICAN PUMICE CO. to proceed with the prosecution of the condemnation actions above referred to. Said actions shall be prosecuted with reasonable diligence and no compromise of said action shall be entered into unless the terms of said compromise have been approved in writing by said GEORGE T. GOGGIN, as trustee aforesaid, HEATH, and the Referee in Bankruptcy in charge of the proceedings of TRANS-PACIFIC CORPORATION, Bankrupt.

"AMERICAN PUMICE CO. may appeal from any judgment or judgments rendered in said condemnation actions or move for a new trial or a different form of judgment, but need not do so unless first there shall have been adequate security furnished to it by the trustee or HEATH to provide for all cost, expense and liability of every kind which might be incurred with such procedure; however, neither the trustee nor HEATH shall be under any obligation to furnish such security. If such security shall be furnished to AMERICAN PUMICE CO. by either of said persons then the desired action shall be taken either by AMERICAN PUMICE CO. or by a party furnishing the security, in the name of AMERICAN PUMICE CO. in the event that AMERICAN PUMICE CO. shall fail to take such desired action. Should a party other than the trustee or HEATH fur-

amount, $26,000 had been deposited in court when the condemnation actions were begun. Both the United States and American Pumice, through attorneys Dolle and Hansen, filed notices of appeal.

On July 26, 1965, a conference was held in the chambers of the referee, at which the trustee, his counsel, attorneys Dolle and Hansen, and Heath, were present. On

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nish the security, such security shall be a first obligation of AMERICAN PUMICE CO. in the event AMERICAN PUMICE CO. prevails in the appeal.

. . . .

"Said condemnation actions shall be handled on behalf of AMERICAN PUMICE CO. by RUSSELL B. SEYMOUR and FRANK C. WELLER and such attorney as may be designated by HEATH, the employment of such attorney, however, shall be authorized by the Referee in Bankruptcy in the matter of TRANS-PACIFIC CORPORATION and shall likewise be authorized by AMERICAN PUMICE CO. The compensation of such attorneys shall be approved and fixed by the Referee in Bankruptcy in the matter of TRANS-PACIFIC CORPORATION. Said attorney selected by HEATH shall be chief counsel.

"Actual costs incurred in said litigation shall be chargeable to AMERICAN PUMICE CO. in the first instance, but shall be advanced by the trustee out of funds presently held by the trustee from the several bankrupt estates in proportions to be fixed by the Referee. 'Actual costs' in this paragraph shall include all filing fees, reporter's fees and charges, including transcripts of proceedings, witness fees, service fees and any other similar items customarily expended in the progress of lawsuits of this nature, and shall also include the fees and expenses of expert witnesses only, however, if such expert witnesses are employed pursuant to an order of this court.

"Costs incurred in respect to attorney's fees in said litigation shall not be advanced by the trustee out of funds presently held by him in the several bankrupt estates, but shall be paid in the manner hereinafter set forth.

"(h) If any of said condemnation actions shall become final, and judgment therein carried out, the following things shall be done in the order of priority set out and to the extent that funds are available:

1. AMERICAN PUMICE CO. shall pay to the attorneys employed to conduct said condemnation actions, a reason-

(This footnote is continued on the next page)

July 30, 1965, an order was made as follows:

"1. That special counsel proposed [by Heath] to be employed in said condemnation action in substitution of Judge Victor R. Hansen and Hodge L. Dolle be denied;

2. That there be no appeal upon behalf of the trustee in said action;

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able amount for services rendered by them in said condemnation actions, the amount, however, to be fixed by order of the referee in charge of the proceedings involving TRANS-PACIFIC CORPORATION.

2. AMERICAN PUMICE CO. shall pay to the appropriate taxing authorities or government agencies, whether federal, state or municipal, any and all taxes which may then be owing by AMERICAN PUMICE CO. If there be any disputed claims asserted, AMERICAN PUMICE CO. shall retain sufficient funds to equal the amount thereof and in addition thereto, a reasonable amount to provide for possible interest, penalties and costs of defending against said claims. HEATH shall have the right in the name of AMERICAN PUMICE CO. to dispute and litigate any claims asserted which he alleges to be invalid or excessive.

. . . .

4. There shall be repaid to the trustee, all sums which may have been advanced by him under any of the provisions of this order.

5. AMERICAN PUMICE CO. shall pay to the trustee a sum, which, together with the funds or assets held by the the trustee, will be sufficient to pay in full the principal amount of all claims filed and allowed and unpaid in any of the several bankrupt estates named herein, together with expenses of administration. P. S. SEYMOUR-HEATH or AMERICAN PUMICE CO. shall have the right in the name of the trustee to contest any claims which he or it deems to be invalid or excessive.

6. Upon receipt of said sums, the trustee shall assign and delver to HEATH or his nominee, all shares of stock in AMERICAN PUMICE CO. and in TRANS-PACIFIC CORPORATION, whether preferred or common, which are in the possession of the trustee. Thereupon, the trustee shall have no claim, right, title, interest or lien upon any of the funds remaining in AMERICAN PUMICE CO. after payments have been made by AMERICAN PUMICE CO. pursuant to the provisions of this order."

3. If the Government appealed, Judge Victor R. Hansen and Hodge L. Dolle as special counsel to prosecute the defense thereof and represent the trustee therein;

4. If P. S. Seymour-Heath desires to proceed with an appeal from the award of the U.S. District Court, he may do so at his own expense and upon the posting of an acceptable surety bond in the amount of $225,000 with this court to protect these estates from any diminution from the award as it presently stands."

That order has also long since become final. Heath did not post the bond or provide funds for an appeal, and the appeal of American Pumice has lapsed. The order contains findings that Dolle and Hansen recommended against an appeal, giving their opinion that it would not be successful, that the trustee relied on their views, and that his counsel agreed. It was also found that the combined assets of the estates were less than $2500. The order is entitled in only two of the bankruptcies, those of Trans-Pacific and of Communications Equipment Corporation.

On July 18, 1966, the trustee filed in each proceeding, except that of New-Bart Stamping and Manufacturing Company, an application to enter into a compromise of the two condemnation cases. It recites that attorneys Dolle and Hansen are of the opinion that an appeal by American Pumice would be unsuccessful, a view in which counsel for the trustee concur. Dolle and Hansen also are of the opinion that there is danger that the

United States may be successful in its appeal, that the award may be diminished or even lost.[2]

The compromise proposed is as follows: The United States will pay to the trustee the principal of the judgments. The trustee is to waive interest at 6% as follows:

1.) on $48,500 from October 19, to November 6, 1945—18 days;

2.) on $31,250 from November 6, 1945; and

3.) on $110,000 from March 30, 1945.

(A rough calculation indicates that the interest to be waived is in excess of $180,000.) The United States will waive any claim for any taxes on the award, including capital gains tax, and will pay the principal amount to the trustee, thus waiving its rights, if such right exists, to offset against the judgment certain large tax and renegotiation claims that it has against various of the bankrupt corporations.[3] The moneys are to be used to pay costs of administration in the bankruptcy proceedings, amount not stated, and the residue is to be

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[2]Nowhere in the record are any facts stated in support of these views. On the other hand, the record is equally barren of any facts on which an opinion to the contrary could be predicated.

[3]These claims are listed by the referee as having been approved:

Tax claims:		
against	Trans-Pacific	$ 11,194.88
"	Communications Equipment	128,477.80
Renegotiation claims:		
against	Trans-Pacific	246,537.75
"	Communications Equipment	110,517.15
	Total	$496,727.58

An appeal, attacking the validity of these claims, is now pending here. Heath asserts that they amount to $346,000, not $496,727.58, and that none is valid

applied upon the claims of the United States. We express no opinion as to whether the government has any right of set-off.

It is apparent that the principal item of costs of administration will be the fees of Dolle and Hansen for defending the condemnation cases, and that, if the compromise is carried out, there will be no money for Heath and none for general creditors.[4] Heath asserts that the award is far too low.[5] That some or all of the tax and renegotiation claims of the United States can be defeated, and that the compromise will make the obtaining of any money, over and above expenses of administration and claims of creditors, impossible.

The referee, over the objections of Heath, approved the compromise by an order entered on September 23, 1966. Heath sought review by the District Court. By an order entered March 16, 1967, the court denied the petition for review. It adopted the findings and conclusions of the referee. It is from this order that Heath appeals.

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[4]The referee, in his certificate on review, lists other claims as follows:

	Trans-Pacific	Communications
Labor claims	$ 687.72	$ 100.00
State and local taxes	9,086.81	7,446.52
Unsecured claims	9,313.26	34,718.85
	$19,087.79	$42,265.37
Grand total		$61,353.16

The present assets of the estates are $823.24.

[5]In this he is perhaps corroborated by a letter, written to him by attorney Dolle after trial but before judgment in the condemnation cases. There, Dolle indicated that he anticipated a far more substantial recovery and that "the valuation testimony presented by the government was shabby and almost worthless." We do not pass upon the validity of Heath's claims that an appeal should be successful. However, his good faith in so believing is nowhere questioned.

Appellees seek to support the order on two grounds. First, they say that the order of October 20, 1959 cannot limit the general power of the trustee, with the approval of the court, to compromise. (See section 27 of the Bankruptcy Act, 11 U.S.C. § 50.) Much authority as to the power to compromise is cited. See, *e.g., In re California Associated Prods. Co.*, 9 Cir., 1950, 183 F.2d 946, 949. But the question here is limited. Here, under an order approving a compromise made in the same bankruptcy proceedings, an order long since final, the trustee is bound by the following language:

> ". . . and no compromise of said action[s] shall be entered into unless the terms of said compromise have been approved in writing by . . . HEATH." (See note 1, *supra.*)

We think that that order, which was made under the very broad authority conferred by section 27, is binding, and that the trustee had no power to violate it, nor has the referee or the court power to authorize the trustee to violate it. No case has been cited to us dealing with this problem. But we think that general principles of res judicata and law of the case, as well as those dealing with finality of judgments, require the conclusion that we reach.

If Heath were willing now to compromise the rights secured to him by the 1959 order, we would have a case like the *California Associated Products Co.* case. But he is not, and the trustee cannot, by compromising with someone else, deprive him of rights secured by the 1959 order. In essence, the 1959 order is a judgment by consent of the compromising parties. It is now final and is no more subject to being disregarded than any

other final judgment. See *Swift & Co. v. United States*, 1928, 276 U.S. 311; *Wood Bros. Const. Co. v. Yankton County, S.D.*, 8 Cir., 1931, 54 F.2d 304, 308.

Second, appellees urge that the order appealed from does not violate, or is not inconsistent with, but carries out the terms of the 1959 order. This was the view of the referee, who construed the restriction upon compromises as relating only to a compromise occurring before trial of the condemnation cases. In so holding, he relied in part upon the language of that order dealing with appeals (see footnote 1) and also upon the order of July 30, 1965. We agree that the order of July 30, 1965, which is also final, governs the right of Heath to appeal, or to require American Pumice or the trustee to appeal. The requirements of that order not having been met, and the appeal having been dropped, the only pending appeal is that of the United States. But that does not necessarily mean that the trustee can compromise, while the appeal is pending, or after judgment, without Heath's written consent.

We think that the language of the 1959 order, which is quoted above, means the entire actions, including proceedings after judgment, if any, whether by appeal or otherwise. Unless the word "actions" is so construed, the protection afforded to Heath, as well as to the trustee, against unacceptable compromises, could well become illusory. A compromise after judgment and pending appeal could be just as damaging as one made before judgment. The facts in this case are illuminating. The proposal is to waive in excess of $180,000 in interest, and the only visible benefit to anyone from the compromise is that what is left of the judgment can be used to pay expenses of administration, including the

fees of Messrs. Dolle and Hansen, the balance to be applied to the government's tax and renegotiation claims. We note that the trustee declined to seek review of the tax and renegotiation claims of the government, and that it is Heath who is bearing the burden of that review. Even if he were wholly successful, most of what would come in from the compromise here involved would still be used up in the bankruptcy. The total to be received is $167,500. The other claims total $61,353.16, plus attorneys fees for Dolle and Hansen, plus advances, if any, by the trustee in the condemnation cases, plus expenses of administration in an unknown (so far as the record shows) amount. We think that it was against just such a possibility that the requirement of Heath's consent was designed to protect him.

Nor do we find anything in the provisions of the 1959 order relating to appeals that is inconsistent with the foregoing. Those provisions merely recognize the fact that an appeal costs money and involves risks. They cut off the obligation of the trustee to advance moneys in support of an appeal by American Pumice or Heath, making it clear, however, that Heath can, upon giving security against loss, prosecute an appeal at his own expense.[6] They do not deal at all with what is to be done about an appeal by the United States. This is taken care of by the July 30, 1965 order, which directs that, if the United States appeals, Dolle and

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[6]Heath may have abandoned his right to appeal because of belief that the entire amount of the condemnation judgment, including the large sum of accrued interest, would be recovered and in the security of his belief that the original order prevented agreed reduction of the judgment without his written consent.

Hansen are to defend the appeal and represent the trustee. In short, we think that, if Heath's or the trustee's right to prevent a compromise had been intended to be applicable only before judgment, and not when there was an appeal, the compromise order of 1959 would have said so. It does not.

The order is reversed with directions to enter an order disapproving of the compromise.

BARNES, Circuit Judge, dissenting:

I dissent. The interpretation of the October 20, 1959 compromise, as made by the referee, and followed by the district court, is reasonable, in view of the various rights waived therein, and the general tenor of the instrument.

The trustee thought it best there be no appeal. Seymour-Heath could have appealed, had he desired, and been able, to post a bond. This he did not do. The July 30, 1965 order is final. Any appeal by American Pumice has lapsed. Thus, the question here involves the compromise of a judgment, not a cause of action. The October 20, 1959 compromise refers, in paragraphs 1(g) to Heath's right to approve any compromise "of the condemnation action," not to approve *any* compromise, or the compromise of any *judgment,* after trial. It may be presumed that the parties anticipated an ultimate solution by some judgment in the condemnation proceedings.

The parties did not state that Seymour-Heath had a right to veto any compromise of a judgment. The parties anticipated that if Seymour-Heath was not satisfied with the judgment obtained, he could force an ap-

peal, but required the posting of a bond. This he never accomplished.

While it is true that the proposed compromised judgment will insure that attorneys are paid, and that the the condemnee waives interest in a substantial sum due from the government, the government waives any claims for taxes on the award (including capital gains tax), and waives certain large tax renegotiations' claims against two of the corporations, which amount to almost half a million dollars (though the validity of such government claim is disputed). Each of these waivers can be of substantial value to the bankrupt estate.

I do not believe this appeals' court has the omniscience to overrule the judgment of the trustee, the referee, the district court, and reputable counsel (particularly skilled in condemnation matters), on the assumption that an original "owner of the stock of the corporations" has better judgment as to the value of the properties condemned, after there has been a proper trial and judgment, where the possible proceeds involve a bankruptcy of some twenty-one years standing.